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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

THE CONSOLIDATED DELTA SMELT
CASES

Lead Case:
1:09-cv-407-LJO-BAM

Member Cases:
1:09-cv-422-LJO-DLB
1:09-cv-631-LJO-DLB
1:09-cv-892-LJO-GSA

Partially Consolidated With:
1:09-cv-480-LJO-GSA
1:09-cv-1201-LJO-DLB

JOINT STATUS REPORT

THE CONSOLIDATED SALMONID
CASES

Lead Case:
1:09-cv-1053-LJO- BAM

Member Cases:
1:09-cv-1090-LJO-DLB
1:09-cv-1378-LJO-DLB
1:09-cv-1520-LJO-DLB
1:09-cv-1580-LJO-DLB
1:09-cv-1625-LJO-SMS

JOINT STATUS REPORT

1 The Court's March 5, 2014 Order Re Motion to Extend Remand Schedule, Smelt Doc.
2 No. 1116; Salmonid Doc. No. 753 ("Order"), states that "within seven days of any ruling by the
3 Ninth Circuit in the *Delta Smelt Consolidated Cases*, the parties are directed to file a joint status
4 report outlining their respective positions on the impact of any such ruling on these consolidated
5 cases." Order at 8. The Ninth Circuit issued its ruling in the *Delta Smelt Consolidated Cases* on
6 March 13, 2014. *San Luis & Delta-Mendota Water Auth. v. Jewell*, --F.3d--, 2014 WL 975130
7 (9th Cir., Mar. 13, 2014). Therefore, the parties respectfully submit this status report to outline
8 their respective positions on the impact of such ruling on the above-captioned consolidated cases.

9 I. Federal Defendants

10 Federal Defendants believe that the Ninth Circuit's ruling in *San Luis & Delta-Mendota*
11 *Water Authority v. Jewell*, --F.3d--, 2014 WL 975130 (9th Cir., Mar. 13, 2014) has direct
12 implications for the remand of the U.S. Fish & Wildlife Service's ("FWS") 2008 delta smelt
13 biological opinion ("2008 BiOp") that was ordered by the District Court. In particular, the Ninth
14 Circuit has ruled that the 2008 BiOp is lawful in all respects and "reverse[d] the district court's
15 remand of the BiOp." *Id.* at *9. The Ninth Circuit ordered that the matter be "remanded to the
16 district court for further proceedings consistent with this opinion." *Id.* at *56.

17 Federal Defendants believe that the prudent course consistent with the Ninth Circuit's
18 ruling is for this Court to stay any further remand of the 2008 BiOp to FWS, including the
19 Court's March 5, 2014 Order and the requirement to submit interim joint status reports regarding
20 the Collaborative Science and Adaptive Management Process ("CSAMP") insofar as it applies to
21 FWS. Notwithstanding any such stay of the remand of its BiOp, FWS intends to continue to
22 participate in CSAMP.

23 Because the appeals in the *Consolidated Salmonid Cases* have not yet been resolved by
24 the Ninth Circuit, Federal Defendants do not maintain that the remand of the National Marine
25 Fisheries Service's ("NMFS") BiOp or this Court's March 5, 2014 Order must be stayed with
26 respect to NMFS at this time. Thus, NMFS intends to continue to adhere to the Court's March 5
27 Order, including the requirement to submit interim joint status reports with regard to CSAMP.
28 However, Federal Defendants believe that the Ninth Circuit panel that hears the appeal in the

1 *Consolidated Salmonid Cases* likely will be guided by the delta smelt ruling given the many
2 similarities of issues on appeal, and that such decision is likely to implicate the remand of
3 NMFS' BiOp.

4 Federal Defendants recognize that the Ninth Circuit affirmed the District Court's
5 judgment that the U.S. Bureau of Reclamation ("Reclamation") failed to comply with the
6 National Environmental Policy Act ("NEPA") prior to implementing FWS' BiOp; however, the
7 duty to comply with NEPA lies with Reclamation, and does not implicate the District Court's
8 remand of FWS' BiOp. 2014 WL 975130 at *54 (Ninth Circuit stating that "[w]e recognize that
9 the preparation of an [Environmental Impact Statement ("EIS")] will not alter Reclamation's
10 obligations under the ESA."). Reclamation will continue to comply with the Court's March 5,
11 2014 Order, and intends to complete an EIS by December 1, 2015 as ordered by the District
12 Court.

13 Federal Defendants also recognize that one or more parties may seek further review of
14 the Ninth Circuit's ruling; however such possibility does not justify continuation of the Court-
15 ordered remand of FWS' 2008 BiOp, which has been found to be lawful in all respects by the
16 Ninth Circuit. Indeed, continuing the court-ordered remand of FWS' BiOp would be contrary to
17 the Ninth Circuit's reversal of the District Court's remand to FWS and its remand instructions to
18 this Court to take action "consistent with" its opinion upholding that BiOp. *Id.* at *56. Federal
19 Defendants submit that this Court could address the potential for further review of the Ninth
20 Circuit's ruling by taking an approach similar to that of its March 5, 2014 Order, namely by
21 ordering that the remand of the 2008 FWS BiOp be stayed and directing that, in the event that
22 there is further review of the Ninth Circuit's order – either by the Ninth Circuit itself sitting *en*
23 *banc*, or by the Supreme Court – that the parties file a status report within 14 days of the
24 resolution of such review by those courts, outlining the parties' respective positions on the
25 impact of any such ruling on these consolidated cases.

1 **II. Defendant-Intervenors**

2 Defendant-Intervenors Natural Resources Defense Council *et al.* believe that the Ninth
3 Circuit’s ruling has the following effects on this Court’s continuing oversight of the remands in
4 the *Consolidated Delta Smelt Cases* and the *Consolidated Salmonid Cases*:

5 With regard to the *Consolidated Delta Smelt Cases*, the Ninth Circuit upheld the 2008
6 Delta Smelt Biological Opinion (“BiOp”) in every respect in which the District Court had found
7 it legally flawed. The Ninth Circuit has concluded “that the FWS’s 2008 BiOp is adequately
8 supported by the record and not arbitrary and capricious,” Slip Op. at 53, and reversed the
9 district court’s remand of the biological opinion, Slip Op. at 42. Thus, there is no need for any
10 further remand of that BiOp to the U.S. Fish and Wildlife Service, and the Court’s order on
11 remand should be revised to eliminate that obligation. Under the Ninth Circuit’s ruling, the
12 Bureau of Reclamation continues to have a duty on remand to comply with NEPA regarding its
13 implementation of the BiOp’s Reasonable and Prudent Alternative actions. However, the Ninth
14 Circuit also concluded that “the preparation of an EIS will not alter Reclamation’s obligations
15 under the ESA.” Slip Op. at 149.

16 In addition, the Ninth Circuit’s opinion should result in termination of this Court’s
17 supervision of, and jurisdiction over, the CSAMP process as it relates to delta smelt and
18 implementation of the biological opinion by the U.S. Fish and Wildlife Service. This result is
19 compelled by the Ninth Circuit’s conclusion upholding the biological opinion and reversing the
20 remand of the biological opinion, as well the fact that the Ninth Circuit has specifically upheld
21 the elements of the Reasonable and Prudent Alternative that overlap with the CSAMP process,
22 namely fall outflow management (Fall X2) and Old and Middle River management and
23 entrainment of Delta smelt. *See* Slip Op. at 56, 91; Doc. 1116 at 2.
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1 Finally, the Ninth Circuit’s opinion affects the schedule for completion of Reclamation’s
2 obligations under NEPA. The parties and the Court established the existing schedule for
3 Reclamation to complete its NEPA review based on the deadline for the remanded smelt
4 biological opinion. *See, e.g.,* Mem. Decision & Order re Mot. to Extend Remand Schedule at 1-
5 2 (ECF No. 1106, *Consolidated Delta Smelt Cases*) (“The final amended judgment in the
6 *Consolidated Delta Smelt Cases* requires the U.S. Bureau of Reclamation (“Reclamation”) and
7 the U.S. Fish and Wildlife Service (“FWS”) to complete a revised Biological Opinion (“BiOp”)
8 under the Endangered Species Act (“ESA”) regarding the impact of proposed operation of the
9 Central Valley Project (“CVP”) and State Water Project (“SWP”) on the threatened delta smelt,
10 as well as to conduct certain related analyses under the National Environmental Policy Act
11 (“NEPA”), by December 1, 2013.”). Because Reclamation no longer needs to complete the
12 NEPA analysis coterminous with the deadline for a remanded delta smelt biological opinion, it
13 can be extended if necessary.

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16 With regard to the *Consolidated Salmonid Cases*, the remand of the Salmonid BiOp is
17 not directly affected by the Ninth Circuit’s ruling on the appeals of the *Consolidated Delta Smelt*
18 *Cases*. However, the Ninth Circuit continued the oral argument in the appeals of the
19 *Consolidated Salmonid Cases* from February 10, 2014 until the week of September 15, 2014 “in
20 light of the anticipated opinion” in the *Consolidated Delta Smelt Cases*. *San Luis & Delta-*
21 *Mendota Water Auth. v. Locke, etc.*, Ninth Cir. Nos. 12-15144+, ECF No. 125 (Jan. 27, 2014).
22 Given the similarities of many of the issues on appeal in the *Consolidated Salmonid Cases* to
23 those in the *Consolidated Delta Smelt Cases*, which the Ninth Circuit appears tacitly to have
24 acknowledged with its continuance of the *Salmonid* oral argument in light of the anticipated
25 *Smelt* decision, the panel assigned to the *Salmonid* appeal can be expected to pay close attention
26 to the Ninth Circuit’s March 13 ruling.

1 **III. Oakdale Irrigation District, South San Joaquin Irrigation District and**
2 **Stockton East Water District**

3 The Oakdale Irrigation District, South San Joaquin Irrigation District and Stockton East
4 Water District (“Stanislaus River Plaintiffs”) are not parties to the *Consolidated Delta Smelt*
5 *Cases* and have no view or opinion as to the impact of the Ninth Circuit’s opinion on the remand
6 of the 2008 BiOp. The Stanislaus River Plaintiffs are parties to the *Consolidated Salmonid*
7 *Cases*, and do not believe that the Ninth Circuit’s decision has any impact on the remand of the
8 NMFS’ Salmonid BiOp.

9 **IV. Plaintiffs San Luis & Delta-Mendota Water Authority, Westlands Water**
10 **District, State Water Contractors, Kern County Water Agency, the Coalition**
11 **for a Sustainable Delta, Metropolitan Water District of Southern California,**
12 **Family Farm Alliance, Stewart & Jasper Orchards, Arroyo Farms LLC,**
13 **King Pistachio Orchard and Plaintiff-Intervenor California Department of**
14 **Water Resources**

15 Plaintiffs San Luis & Delta-Mendota Water Authority, Westlands Water District, State
16 Water Contractors, Kern County Water Agency, the Coalition for a Sustainable Delta,
17 Metropolitan Water District of Southern California, Family Farm Alliance, Stewart & Jasper
18 Orchards, Arroyo Farms LLC, and King Pistachio Grove and Plaintiff-Intervenor California
19 Department of Water Resources (“Smelt Plaintiffs”) are currently evaluating the split decision of
20 the Ninth Circuit panel.¹ Recognizing that one or more parties are likely to seek further review
21 of the decision and in light of the fact that Federal Rule of Appellate Procedure (“FRAP”) 41
22 governs the issuance of a mandate and provides that a mandate will not issue until – at the
23 earliest – seven days after the time to file a petition for rehearing expires, Smelt Plaintiffs
24 contend that the Court’s Order Re Motion to Extend Remand Schedule, Smelt Doc. No. 1116;
25 Salmonid Doc. No. 753 (March 5, 2014) (“Order”) should remain in effect at least until the
26 Ninth Circuit issues a mandate. During the interim period, Smelt Plaintiffs expect the
27 Collaborative Science and Adaptive Management Program (“CSAMP”) to continue, as
28 contemplated by the Court’s Order.

¹ It is the view of Smelt Plaintiffs that, at this time, the Ninth Circuit’s decision does not affect the Court’s Order with respect to the *Consolidated Salmonid Cases*.

1 Smelt Plaintiffs respectfully request that this Court deny Federal Defendants' request "to
2 stay any further remand of the 2008 BiOp to FWS, including the Court's March 5, 2014 Order
3 and the requirement to submit interim joint status reports regarding the Collaborative Science
4 and Adaptive Management Process ('CSAMP') insofar as it applies to FWS."² That request is
5 premature in light of the fact that a mandate has not been issued. *See* FRAP 41(c), 1988 Adv.
6 Comm. Notes ("A court of appeals' judgment or order is not final until issuance of the mandate;
7 at that time the parties' obligations become fixed."). In a recent case, the Ninth Circuit affirmed
8 the plain language of the Rule and the Advisory Committee Notes, holding that no opinion
9 becomes final until the mandate issues and that the court of appeals may modify or revoke its
10 judgment *sua sponte* or by motion at any time prior to issuance of the mandate. *NRDC v. County*
11 *of L.A.*, 725 F.3d 1194, 1203 (9th Cir. 2013) (*citing Carver v. Lehman*, 558 F.3d 869 (9th Cir.
12 2009) and *United States v. Foumai*, 910 F.2d 617 (9th Cir. 1990)). The court went on to hold
13 that until a mandate is issued, a judgment or opinion is not the law of the case. 725 F.3d at 1203
14 (*citing Carver v. Lehman*, 558 F.3d at 878). In light of the foregoing and the fact that the Ninth
15 Circuit has not issued a mandate, we urge this Court to decline the requests of Federal
16 Defendants and Defendant-Intervenors that it prematurely act or alter the status quo, including
17 the CSAMP, which was put in place at the request of Federal Defendants.

18 In lieu of Federal Defendants' request, Smelt Plaintiffs propose that the parties submit a
19 joint status report to the Court within seven days of entry of the issuance of a mandate by the
20 Ninth Circuit, in the above-captioned *Consolidated Delta Smelt Cases*. In the intervening period,
21 Smelt Plaintiffs propose that, should any party wish to alter the status quo, such party may seek
22 to do so by noticed motion in accordance with applicable law.

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² Likewise, Smelt Plaintiffs request that this Court deny Defendant-Intervenor's premature and sweeping request.

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